

NO. 47641-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

OLYMPIC STEWARDSHIP FOUNDATION, J. EUGENE FARR,
WAYNE AND PEGGY KING, ANNE BARTOW, BILL ELDRIDGE,
BUD AND VAL SCHINDLER, RONALD HOLSMAN, CITIZENS'
ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY,
CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,
MATS MATS BAY TRUST, JESSE A. STEWART REVOCABLE
TRUST, CRAIG DURGAN, and HOOD CANAL SAND &
GRAVEL LLC d/b/a THORNDYKE RESOURCE,

Petitioners,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE
HEARINGS OFFICE, acting through the WESTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD; STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY; and
JEFFERSON COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

DEPARTMENT OF ECOLOGY'S RESPONSE BRIEF

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I. INTRODUCTION

This case is judicial review of a Final Decision and Order (FDO or Order) issued by the Western Washington Growth Management Hearings Board (Board) in which the Board affirmed the Jefferson County Shoreline Master Program (SMP) in all respects. The SMP was adopted by Jefferson County (County) and approved by the Department of Ecology (Ecology). Petitioners made a large number of arguments attacking the SMP under various theories. Petitioners' arguments were fully considered and ultimately rejected by the Board in a thorough and well-reasoned 94-page decision. Because Petitioners cannot meet their heavy burden in proving that the Board's Order violates the Shoreline Management Act (SMA or Act) or its implementing Guidelines,¹ and because Petitioners cannot meet their heavy burden in proving that the SMP is unconstitutional, this Court should affirm the SMP and dismiss Petitioners' appeals.

II. COUNTERSTATEMENT OF ISSUES

This case involves three separate consolidated appeals brought by (1) Olympic Stewardship Foundation, J. Eugene Farr, Wayne and Peggy King, Anne Bartow, Bill Eldridge, Bud and Val Schindler, and Ronald Holsman (collectively, OSF); (2) Citizens' Alliance for Property Rights

¹ See generally WAC 173-26. Although commonly referred to as "guidelines," the rules set forth goals, procedures, and minimum requirements that a planning jurisdiction must follow in updating shoreline master programs—the suite of plans and regulations governing use and development in shorelines. WAC 173-26-171(3); *Futurewise v. Spokane Cty.*, E. Wash. Growth Mgmt. Hearings Bd. (EWGMHB) No. 13-1-0003c, at 4 (Dec. 23, 2013).

Jefferson County, Citizens' Alliance for Property Rights Legal Fund, Mats Mats Bay Trust, Jesse A. Stewart Revocable Trust, and Craig Durgan (collectively, CAPR); and (3) Hood Canal Sand & Gravel, LLC dba Thorndyke Resource (Hood Canal Sand).² Collectively, Petitioners raised 247 issues before the Board. Clerks Papers (CP) 824. The Board directed the effort in which a reduced set of issues was eventually agreed upon. CP 2162, 2169-74. The issues raised by each Petitioner for this Court's review are set forth below.

A. Olympic Stewardship Foundation

1. Whether the SMP protects private property rights.
2. Whether the SMP properly requires new development to meet No Net Loss.
3. Whether the SMP lawfully includes a restoration element.
4. Whether the County was required to comprehensively amend the SMP under RCW 90.58.080.
5. Whether the Board appropriately dismissed arguments abandoned by OSF at the Board.
6. Whether the incorporation of the County's Critical Areas Ordinance into the SMP is lawful.
7. Whether the SMP's Natural Shoreline Designation is lawful where it is based on an extensive inventory of the shorelines.
8. Whether the Board erred in concluding the SMP met the SMA and the SMA Guidelines, including WAC 173-26-186.
9. Whether the SMP's Buffer and Public Access Provisions are Facially Unconstitutional.

² The Board later granted the Hood Canal Coalition's request to join the case as an Intervenor Respondent. CP 7456.

B. Citizens Alliance for Property Rights, et al.

1. Whether the SMP is based on an interdisciplinary approach as required under RCW 90.58.100 and WAC 173-26-201.
2. Whether the SMP is unconstitutionally vague.
3. Whether the SMP provisions addressing beach stairs, shoreline armoring, boating facilities, and floodplain development are lawful.
4. Whether CAPR's due process rights were violated by the Board.

C. Hood Canal Sand & Gravel

1. Whether the SMA precludes a local jurisdiction from restricting uses in the Conservancy shoreline environment.
2. Whether Hood Canal Sand waived its argument related to GMA consistency, and if not, whether Hood Canal Sand can meet its burden in proving GMA consistency where it fails to meet the criteria in the SMA Guidelines.
3. Whether Hood Canal Sand's arguments regarding consistency with other statutes are properly before this Court.
4. Whether the SMP's prohibition of new industrial piers in the Conservancy environment is supported by science.
5. Whether Hood Canal Sand was afforded opportunity to comment on the SMP's industrial pier provisions.³

III. COUNTERSTATEMENT OF THE CASE

A. Overview of the SMA

The SMA was enacted due to the “ever increasing pressures of additional uses [that] are being placed on the shorelines” and impacting this “most valuable and fragile” natural resource. RCW 90.58.020. In enacting the SMA, the Legislature acknowledged the “great concern

³ Ecology relies on the County to address this argument.

throughout the state relating to their utilization, protection, restoration, and preservation,” and recognized that “unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest.” RCW 90.58.020. Accordingly, the SMA calls for “coordinated planning [that] is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest.” *Id.* To this end, the SMA emphasizes a planning policy that prioritizes “reasonable and appropriate uses” of the shoreline, emphasizing water dependent uses and allowing single family residences. *Id.* The Act “contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life” *Id.* “Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized,” are prioritized to favor those uses that are “consistent with control of pollution and prevention of damage to the natural environment,” or “dependent upon use of the state’s shorelines.” *Id.*; *Nisqually Delta Assoc. v. DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985).

In order “to prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines,” the SMA calls for coordinated authority between the state and local governments. Local governments develop plans and regulations to govern use and development which are called a “shoreline master program” or SMP. Ecology reviews the SMP for consistency with RCW 90.58.020 and

Ecology's Guidelines, and the SMP is not effective until it has been approved by Ecology. RCW 90.58.090(2) and .090(7); *Citizens for Rational Shoreline Planning v. Whatcom Cty.*, 172 Wn.2d 384, 392-93, 258 P.3d 36 (2011); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697, 169 P.3d 14 (2007) ("the SMA provides for state checks and balances on local authority..."). Once approved by Ecology, the local master program is considered part of the state shoreline master program. RCW 90.58.030(3)(d).

On appeal before this Court is the Jefferson County SMP, which Ecology approved on February 7, 2014, after extensive public comment and comprehensive review for compliance with the SMA and the Guidelines. The Growth Management Hearings Board then held an adjudicative proceeding and made formal findings and conclusions affirming Ecology's actions. It is the Board's decision that comes before this Court under the APA.

IV. STANDARD OF REVIEW

The standards for review of agency orders under the APA are set forth in RCW 34.05.570(3), which provides in relevant part:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

....

- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is

substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

....

RCW 34.05.570(3).

Under the “error of law” standards of subsections (c) and (d), the court engages in de novo review of the agency’s legal conclusions. *Franklin Cty. Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983). However, where an agency interprets a law it administers, courts give substantial weight to the agency’s interpretation. *Kitsap Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (CPSGMHB)*, 138 Wn. App. 863, 871-72, 158 P.3d 638 (2007); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004); *Hubbard v. Dep’t of Ecology*, 86 Wn. App. 119, 123, 936 P.2d 27 (1997). In this case, where Petitioners seek to reverse a decision that both Ecology and the Board agree upon, the Court should be “loath to override the judgment of both agencies, whose combined expertise merits substantial deference.” *Port of Seattle*, 151 Wn.2d at 600.

Under RCW 34.05.570(3)(e), this Court may grant relief if the Board’s Order is “not supported by evidence that is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3)(e). The substantial evidence test is “highly deferential.” *ARCO Prods. Co. v. Utils. & Wash. Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). Finally, this Court may grant relief if the agency’s order is “arbitrary” or “capricious.” RCW 34.05.570(3)(i).

Arbitrary or capricious agency action has been defined as action that “is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Wash. Indep. Tel. Ass’n v. Wash. Utils. Transp. Comm’n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003) (quoting *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997)).

When bringing a petition involving “shorelines,” Petitioners carry the burden at the Board to prove that the SMP is clearly erroneous. RCW 36.70A.320(A). For “shorelines of statewide significance” (SSWS), Petitioners have to show “by clear and convincing evidence” that the SMP “is noncompliant with the policy of RCW 90.58.020 or the applicable guidelines.” RCW 90.58.190. The Board applied both standards of review in evaluating, and ultimately rejecting, all of Petitioners’ claims. CP 7460-61.

V. ARGUMENT

A. Olympic Stewardship Foundation

1. The SMP protects private property rights (OSF issues A and C)

OSF alleges that the SMP unlawfully favors protection of the shorelines over private property rights.⁴ OSF’s objection is not directed to any particular SMP provision. Instead, OSF focuses on the Board’s reliance on precedent in which the courts have stated that “private

⁴ At the outset it should be noted OSF cites to very little of the material that it has used to supplement the record. Moreover, a substantial number of the statements in the declarations filed by OSF lack sufficient foundation and are irrelevant. The Court should disregard such statements under ER 401, 402, 601, 602, and 701.

property rights are secondary to the SMA's primary purpose, which is "to protect the state shorelines as fully as possible." CP 7532 (FDO at 80); *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009) (citing *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998)) (quoting *Buechel v. Dep't of Ecology*, 125 Wn.2d at 203, 884 P.2d 910 (1994)). OSF's objections do not warrant reversal of the Board's affirmation of the SMP. The Board simply was quoting well-established case law interpreting the SMA.

The SMA identifies three primary goals: (1) protection of the shoreline; (2) enhancement of public access and enjoyment of the shoreline; and (3) prioritization of water dependent uses and single family residences. RCW 90.58.020; *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd. (WWGMHB)*, 164 Wn.2d 242, 244, 189 P.3d 161 (2008), *Overlake Fund v. Shorelines Hearings Bd.*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998). Consistent with these policies, "[a]lterations of the natural condition of the shorelines of the state, in those limited instances when authorized," are prioritized to favor those uses that are "consistent with control of pollution and prevention of damage to the natural environment," and "dependent upon use of the state's shoreline[s]." RCW 90.58.020(7); *Nisqually Delta Assoc. v. DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985).

The SMA recognizes that shorelines are a limited ecological and socioeconomic resource and that competing interests need to be "balanced" to achieve the Act's policy goals. *See, e.g. Futurewise v.*

WWGMHB, 164 Wn.2d at 243; *Biggers*, 162 Wn.2d at 697. However, the SMA does not contemplate a weighing of socioeconomic interests against protection of the environment in a given set of circumstances. Instead, the Guidelines provide the framework to resolve the inherent tension between these potentially conflicting interests through the concept of “no net loss.” See RCW 90.58.620, WAC 173-26-186(8), -201(2)(c). As the SMP and SMA Guidelines confirm, no net loss does not preclude development. Uses and developments that are consistent with the policies and provisions of the Act and the SMP are permitted.

OSF appears to argue that any restriction or limitation on development in shorelines violates the SMA policy goal of prioritizing single family residential and water dependent uses, but this argument has been rejected by multiple courts. For example, in *Lund*, this Court rejected the argument that a denial of a shoreline conditional use permit for an overwater residence thwarted the SMA policy of protecting private property rights. *Lund*, 93 Wn. App. at 336-37. The Court was following precedent set by the Supreme Court in *Buechel* in which the court rejected a similar argument in affirming the denial of a variance permit for construction of a single family residence. *Buechel*, 125 Wn.2d at 209; see also *Samson*, 149 Wn. App. at 51 (recognizing that SMA does not require a jurisdiction to allow docks on every shoreline).

The Board did not err by following the law as interpreted by the courts. As required under the SMA, the SMP protects private property rights by planning for and authorizing “reasonable and appropriate uses”

while “protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life.” RCW 90.58.020.

2. The SMP properly requires new development to meet no net loss (OSF issue C)

The Board rejected OSF’s arguments below that the Guideline goal of planning for no net loss can only be implemented at the permitting level. CP 7484 (FDO at 32). OSF now makes the opposite argument on appeal by alleging that the SMP is invalid for misapplying no net loss to individual permits for new development. *See* OSF Brief at 36. Contrary to OSF’s characterization of the issues, the SMP is valid. A SMP must include provisions that require individual projects “to analyze environmental impacts of the proposal and include measures to mitigate environmental impacts not otherwise avoided or mitigated by compliance with the master program and other applicable regulations.” WAC 173-26-201(e)(i); *see also* WAC 173-26-201(e)(ii)(A) (“Application of the mitigation sequence achieves no net loss of ecological functions for each new development . . .”).

OSF misinterprets no net loss as a prohibition on development. To the contrary, no net loss is a means of authorizing development, even when it causes impacts, so long as the end result is that the ecological functions of the shoreline are maintained. The Board did not err by rejecting OSF’s arguments on this topic.

3. The SMP lawfully includes a restoration element (OSF issue D)

The Guidelines require a “restoration element.” RCW 90.58.020. To meet this requirement, SMPs must include goals and policies that provide for restoration of state shorelines with impaired ecological functions. WAC 173-26-186(8)(c). On a related note, a SMP is also required to implement certain use preferences for shorelines of statewide significance.⁵ RCW 90.58.020.

Following the statute and Guidelines, the SMP here addresses development in shorelines of statewide significance: “[w]hen shoreline development or redevelopment occurs, it shall include restoration and/or enhancement of ecological conditions if such opportunities exist.” CP 6020 (SMP, Art 5.3.A.1). Contrary to the premise of OSF’s objection, this provision does not mean that the County can compel mitigation above and beyond what is necessary to address the impacts of a proposal. Instead, this provision requires the County to look for opportunities to restore the shoreline where appropriate. For example, mitigation for a redevelopment project could include shoreline restoration as mitigation for the project’s impacts, e.g., riparian plantings in a buffer. This is wholly

⁵ “The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.” RCW 90.58.020.

appropriate.⁶ In any event, including this provision in the SMP is not unlawful, and these SMP provisions should be affirmed.

4. The County was required to update the SMP under RCW 90.58.080 (OSF issue B)

OSF argues that the County was not required to update the SMP without first making a determination that existing regulations are inadequate, and without demonstrating that a change in circumstances justifies the update. OSF is incorrect.

First, OSF cites no authority for the proposition that a jurisdiction can meet its SMA obligations by deferring to non-SMA regulations. Second, the justification for the SMP update is found in RCW 90.58.080. The Legislature directed all local governments with shorelines to update their SMPs consistent with Ecology's Guidelines, which became effective in 2004. *See generally* WAC 173-26; *see also* WAC 173-26-090.⁷ Because the SMP had not been amended since the adoption of the Guidelines, a comprehensive amendment was required. RCW 90.58.080. Further, it is not accurate to state the update is not necessary or justified. The Guidelines have refined the scope and content of SMPs, including

⁶ Moreover, in a given circumstance, if the County implements this provision in an arbitrary and capricious or otherwise unlawful manner, it can be addressed in the context of an individual permitting decision. It is not appropriate to conclude that the SMP is unlawful based on speculation as to what might occur in the future, or to assume that it will be unlawfully implemented.

⁷ WAC 173-26-090 provides in part, "[e]ach local government should periodically review a shoreline master program under its jurisdiction and make amendments to the master program deemed necessary to reflect changing local circumstances, new information or improved data. *Each local government shall also review any master program under its jurisdiction and make amendments to the master program necessary to comply with the requirements of RCW 90.58.080 and any applicable guidelines issued by the department.*" WAC 173-26-090 (emphasis added).

revised minimum standards and clarifying the no net loss requirement. CP 4426, 4430. In light of a modern understanding of watershed processes and shoreline resources and their functions, reliance on the outdated building setbacks in the old SMP is inadequate to protect the shoreline. CP 7017. In its adoption of the SMP, the County observed that “[t]wo decades have passed since the last major revision to the County’s SMP. In that time, many scientific reports and analyses of the issues impacting the ecological functions provided by and present at marine and freshwater shorelines . . . has become available.”⁸ CP 6885. Accordingly, the County established technical and policy committees to review the science, conduct an inventory of 500 miles of shoreline, and perform a watershed characterization analysis of ecosystem processes that affect shoreline conditions. *Id.* All of this represents “new information” that OSF complains is lacking.

Additionally, as recognized by the Board, the County updated its critical areas ordinance (CAO) in 2008. CP 7471. Since SMP policies are deemed policies of the comprehensive plan under the GMA, the County is obligated to review and update the SMP for consistency with its updated CAO. *Id.* Last, circumstances have substantially changed in the County including increased shoreline development. CP 6885. As stated in the Cumulative Impacts Analysis, “all of the County’s shorelines have been affected to some degree by land cover changes, increases in impervious

⁸ For example, the SMP bibliography includes approximately 770 citations to scientific and other technical papers. CP 7059-7101.

surface, vegetation clearing, and other actions” CP 6579. For all of these reasons, the update was justified under RCW 90.58.080 and WAC 173-26-090.

5. The Board properly dismissed arguments abandoned by OSF at the Board (OSF issue F)

OSF asserts that the Board improperly dismissed some of its arguments. Because OSF fails to identify the issues it alleges were improperly dismissed by the Board, and because OSF admits it was harmless, OSF’s arguments should be rejected here. RAP 10.3(a)(6).⁹

6. The incorporation of the CAO is lawful (OSF issue B.1)

OSF challenges the SMP’s incorporation of the CAO. For reasons explained below, the incorporation of the CAO into the SMP is lawful.

With Ecology’s approval of the SMP, critical areas located in shoreline jurisdiction are now protected exclusively under the SMA.¹⁰ RCW 36.70A.480(3)(d). A common approach that is used to protect critical areas in shorelines is to incorporate applicable CAO provisions

⁹ The Board properly dismissed OSF’s arguments because they consisted solely of conclusory statements without any explanation how, “as the law applies to the facts before the Board, [the County] has failed to comply with the Act.” CP 7464-65. *See also Fishburn v. Pierce Cty.*, 161 Wn. App. 452, 471, 250 P.3d 146 (2011).

¹⁰ As background, in 2003, the Legislature enacted ESHB 1933 in order to clarify that critical areas in shoreline jurisdiction should be protected solely under the SMA rather than CAOs adopted under the GMA. ESHB 1933, 58th Leg., Reg. Sess. § 1(1) (Wash. 2003). However, there remained some question as to the timing of the transfer of authority to the SMA. *See Futurewise*, 164 Wn.2d at 242. In 2010, the Legislature amended RCW 36.70A.480 so that CAOs adopted under the GMA would apply in shoreline jurisdiction until Ecology approves a comprehensive SMP update under the Guidelines, at which time the critical areas in shorelines would be regulated exclusively under the SMA. Laws of 2010, ch. 107, § 2; *Kitsap All. of Prop. Owners (KAPO) v. CPGMHBB*, 160 Wn. App. 250, at 257-58, 255 P. 3d 969 (2011), *rev. denied*, 171 Wn.2d 1030 (2011) *cert. denied*, 132 S. Ct. 1792, 182 L. Ed.2d 616 (2012).

into a new SMP. This is allowed so long as the incorporated provisions meet SMA requirements.¹¹ RCW 36.70A.480(4); CP 7027-32. The County's marine shorelines are Fish and Wildlife Habitat Conservation Areas, a type of critical area, due to the fact that it is critical habitat for federally listed salmonids.¹² RCW 36.70A.480(5). The marine shorelines are also critical areas due to the widespread presence of key nearshore marine habitats such as eelgrass and kelp beds, shellfish beds, seal haul-outs, and forage fish spawning areas. *Id.*, Jefferson County Code (JCC) 18.22.270(2); CP 6273. These occur so widely throughout the County that "virtually all of the County's nearshore marine environment supports or has the potential to support highly valuable and ecologically sensitive resources."¹³ CP 6273.

Regardless of their status as critical areas, marine shorelines must be protected under the SMA in order to meet no net loss. The inclusion of vegetative buffers is appropriate to protect the ecological functions and ecosystem-wide processes of the marine shorelines.¹⁴ WAC 173-26-221(5), -241(3)(j). In addition to protecting plant and animal species and

¹¹ For example, the SMP supplements (and supersedes in some cases) the incorporated CAO provisions with additional measures for building setbacks, buffers, critical areas stewardship plans, nonconforming uses, and administrative provisions, to reflect the goals and policies of the SMA. CP 6024-25.

¹² The marine shorelines of Hood Canal and the Strait of Juan de Fuca are identified in the Inventory as critical habitat for endangered Chinook and summer chum salmon. The critical habitat for bull trout includes these areas as well as the shorelines of the Pacific Ocean. CP 6272.

¹³ The County's designation of its marine shorelines as critical areas is consistent with Board precedent, in which the Board affirmed Whatcom County's similar treatment of its marine shorelines. *See Citizens v. WWGMHB*, Case No. 08-2-0031, FDO at 15-19 (April 20, 2009).

¹⁴ A local jurisdiction also has an independent obligation under the SMA to protect "critical saltwater habitats" as defined in the Guidelines. *See* WAC 173-26-221(2)(c)(iii).

their habitats, buffers also protect human life and property, increase the stability of river banks and coastal bluffs, reduce the need for shoreline structural stabilization measures, and improve the visual and aesthetic qualities of the shoreline.¹⁵ WAC 173-26-221(5).

Last, OSF's assertion that Ecology did not review the SMP buffer provisions is mistaken. The record includes ample evidence of Ecology's consideration of the buffers. CP 4287, 4288-94, 4576-82, 5012-21, 5022-28, 5031-37, 5039-56, 6788-95. Ecology also reviewed the Cumulative Impacts Analysis, which contains an extensive discussion of the buffers and is a key document in determining that the SMP meets no net loss. CP 6611-12, 6613-17, 6622-23, 6636-37, 6847-54; WAC 173-26-201(3)(d)(iii).

7. The SMP's Natural shoreline designation is lawful where it is based on an extensive inventory (OSF issue D)

OSF argues that the SMP designates too much of the shoreline as Natural shoreline environment. Shoreline environment designations are classifications of shoreline areas that reflect local shoreline conditions, including current ecological functions and existing and anticipated shoreline development. WAC 173-26-211(1); CP 4381. "Shoreline areas that retain the majority of their natural shoreline functions . . . should be

¹⁵ In the Cousins declaration submitted by OSF, Cousins suggests that such buffers are unnecessary because Washington Fish & Wildlife (WDFW) has not imposed any buffer requirements. Cousins declaration at ¶ 21. Cousins neglects to mention that WDFW does not have authority to impose a land use buffer, as WDFW's authority is limited to review of hydraulic projects that affect the bed or flow of state waters. *See generally* RCW 77.55. However, the agency does recognize the importance of buffers. *See* section IV.A.8 *infra* n.18, 19.

designated Natural.” CP 4390; WAC 173-26-211(1), -211(5)(a)(i). Based on an extensive Shoreline Inventory and Characterization (Inventory), the County designated shorelines as Natural if they had “minimum shoreline modification,” “other high quality/pristine habitat characteristics,” or “were important feeder bluffs or otherwise unsuitable for development.” CP 3686. The designations were developed with extensive input from the County’s Shoreline Technical Advisory Committee and Shoreline Policy Advisory Committee. CP 3686. The County also factored in consistency with the comprehensive plan. CP 6012-14 (SMP, Art. 4). Moreover, residential development is now allowed in the Natural environment where it was prohibited by the prior SMP. CP 5930, 6017 (SMP, Art. 4). The Board relied on evidence showing that the County complied with the Guidelines in designating the Natural shorelines. OSF shows no error.

8. The Board did not err in determining that the record supports the SMP buffer requirements (OSF issue B.2)

OSF argues that the Board erred in affirming the SMP’s marine buffer based on its allegations that: (1) the science supporting the buffer is inadequate; (2) the Inventory and Cumulative Impacts Analysis do not justify the buffer; (3) the buffer was established without a baseline; and (4) the County should have deferred to non-SMA regulations to protect the shoreline. For reasons stated below, OSF’s arguments are not well-taken and should be rejected.

It is well-established that freshwater and marine buffers serve similar functions.¹⁶ *KAPO*, 160 Wn. App. at 269. The science supporting the marine buffer is documented extensively in the record.¹⁷ CP 3687-90, 4338-80, 6652-53, 6688-90, 7025-26, 7036-42, 7059-7101, 7102-06, 7107-10, 7111-12. The Inventory alone is based on approximately 242 sources, 196 of which are specific to Western Washington and Puget Sound, and 93 of which are specific to the marine environment. CP 6477-96. For each reach, the Inventory catalogs the nearshore/freshwater processes; physical environment; biological resources; land use and altered condition; public access; and restoration opportunities.¹⁸ CP 6224-6564. The Board described the comprehensiveness of the Inventory:

¹⁶ OSF alleges that studies of freshwater buffers are inapplicable to marine buffers, based on the Shaumburg declaration. OSF Br. at 29-30. Shaumburg criticizes the Brennan study as being a “synthesis,” but there is consensus in the scientific community that marine riparian buffers are critical to sustaining many ecological functions. WAC 173-26-221(5)(b) (“[r]iparian corridors along marine shorelines provide many of the same functions as their freshwater counterparts.”) *See also e.g.* Desbonnet et al. 1994, Brennan and Culverwell 2004, Lemieux et al 2004, Brennan et al. 2009 (cited in the SMP bibliography at CP 7059-7101). In 2008, the WDFW convened an expert panel of 14 scientists who reached the same conclusion that marine buffers provide the same ecological benefits as freshwater buffers. CP 4350-51.

¹⁷ The width of a buffer can vary based on the functions protected. CP 7111-12. For example, the recommended width for habitat function is 288 feet, whereas the minimum recommended for sediment removal is 98 feet. *Id.* Studies from Canada recommend a 300 to 400 foot marine buffer for marine shorelines. *Id.* The WDFW recommends a 250 foot buffer for marine shorelines. CP 4354. As recognized by the Board, the County has “latitude to adopt buffer widths which lie within the range of widths recommended by the assembled information.” CP 7522 (FDO at 70).

¹⁸ OSF cites to a 2004 marine riparian workshop that addressed the need for mapping. OFS Br. at 32. The reference to a mapping system took place in the context of a discussion regarding the need for more information to support marine riparian buffers: “Some importance was also placed on developing science-based guidelines for buffer lengths in addition to widths in order to promote their effectiveness. The most desired management tool was identified as a shoreline mapping system that would include both biological and physical attributes, providing the basis for management prescriptions.” This describes the Shoreline Inventory.

The [Inventory's] section 3, entitled *Ecosystem Characterization and Ecosystem-Wide Processes*, provides an overview of the key species and habitats within the County, including threatened and endangered species, analysis of nearshore and freshwater habitats/species, and ecosystem-wide processes, which include hydrogeologic settings, shoreline processes, process-intensive areas and alterations. Section 4 of the SI, entitled *Reach Inventory and Analyses*, includes 118 pages covering every shoreline reach within the County. The map folio, Exhibit C to the SI, includes more than 30 detailed maps. Those maps show all of the County's "shorelines of the state," marine and freshwater shoreline planning areas, and stream flows (CFS) for the County's rivers and streams. Other maps indicate soil types, channel migration zones, and floodplains. Modifications of the County's shorelines are indicated as are critical areas and critical shoreline habitats. There are maps which show the locations of aquatic vegetation, shoreline use patterns, shellfish harvesting area, forested areas as well as those with impervious surfaces.

CP 7520-21 (FDO at 68-69).

OSF is incorrect in stating there is not a baseline. "[T]he shoreline inventory and characterization provide the baseline for measuring no net loss." CP 4471, 6573. Based on the Inventory's analysis of the baseline conditions, the Cumulative Impacts Analysis evaluates the SMP to determine whether it contains adequate measures to protect and restore shoreline resources as well as mitigate use and development "such that post development conditions are no worse *overall* than the pre-development conditions." CP 6573. Accordingly, the Cumulative Impacts Analysis considers the anticipated impacts of residential development and the provisions in the SMP that address those impacts,¹⁹

¹⁹ OSF asserts that the Cumulative Impacts Analysis concludes that residential development does not adversely impact the shoreline. OSF Brief at 13. However, OSF takes a statement from the Cumulative Impacts Analysis out of context. Contrary to what OSF would have the Court believe, the Cumulative Impacts Analysis documents the

including buffers, in determining that the SMP meets no net loss. CP 6611-16, 6636-39. The Cumulative Impacts Analysis correctly concludes that the SMP “protects shorelines to the highest degree practicable while still accommodating preferred shoreline uses and recognizing private property rights.” CP 6636. OSF fails to prove the Inventory and Cumulative Impacts Analysis are inadequate under WAC 173-26-201(3)(c), (d).

Last, OSF asserts the buffers are unnecessary in light of other non-SMA regulations, such as stormwater regulations and density requirements. OSF fails to support its argument with any authority, nor can it demonstrate that these are adequate substitutes for SMA buffers.

9. The SMP provisions for buffers and public access are constitutional (OSF issues B.2, E)

OSF asserts a facial challenge²⁰ to the SMP’s buffer and public access provisions, arguing that these provisions do not meet the “nexus”

impacts to the shoreline from residential development: “In and of itself, residential development probably does not have major adverse effects on shoreline resources. Most of the effects are caused by actions commonly associated with residential development and use including construction of bulkheads, removal of shoreline vegetation, use of fertilizers and other chemicals, alteration of natural drainage pathways, construction of docks/piers, boating activities and the like. These actions typically cause a variety of impacts that affect physical processes and can damage fish and wildlife species and their habitats.” CP 6613. The Cumulative Impacts Analysis goes on to discuss the other impacts associated with residential development, including shoreline armoring, vegetation clearing, and creation of lawns and impervious surfaces. CP 6613-17.

²⁰ As explained by the County, because OSF is challenging a legislative enactment and not a site-specific permitting decision, its challenge is a facial one. To the extent OSF argues that it is asserting an “as applied” challenge, such claims must be dismissed as they are not ripe. In order to demonstrate ripeness a “plaintiff must give the relevant administrative agency an opportunity to arrive at ‘a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.’” *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 762, 265 P.3d 207 (2011) (quoting *Williamson Cty. Reg’l Planning Comm’n v. Hamilton*, 473 U.S. 172, 191, 105 S. Ct. 3108 (1985)); see also *Peste v. Mason Cty.*, 133 Wn. App. 456, 473, 136 P.3d 140 (2006) (citing *Orion*

and “proportionality” tests (*Nollan/Dolan* test) announced in the U.S. Supreme Court’s decisions in *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994). As explained below, OSF fails to identify an adequate basis for the application of the *Nollan/Dolan* test in a facial attack on the SMP. But even if *Nollan/Dolan* does apply, the SMP satisfies the requirements of nexus and proportionality.

a. *Nollan and Dolan* are distinguishable

In *Nollan*, the California Coastal Commission imposed a permit condition requiring a public access easement in front of Nollan’s house to mitigate view blockage from the uplands. The Court held that to comply with the “takings clause”²¹ there must be what the Court called an “essential nexus” between a permit condition and the impacts of development that the condition is intended to address. *Id.* at 837. In *Dolan*, the City of Tigard conditioned the expansion of Dolan’s retail store to require an easement for a bike path and an easement for that portion of her property that fell within the 100 year floodplain. While there was a nexus between these conditions and concerns about traffic congestion and flooding, the court struck down the conditions because they were not

Corp. v. State, 109 Wn.2d 621, 632, 747 P.2d 1062 (1987)); *Ventures Nw. Ltd. P’ship v. State*, 81 Wn. App. 353, 368-69, 914 P.2d 1180 (1996).

²¹ The Court based its ruling on the fact that had the Commission simply seized the easement, it would have had to pay just compensation under the Fifth Amendment of the U.S. Constitution. However, because the easement was required as a permit condition, it was not a direct seizure. The Court imposed the “essential nexus” requirement to prevent the Commission from doing indirectly what it could not do directly.

“roughly proportional” to the impacts associated with the expansion. *Dolan* at 392-93.

In both *Nollan* and *Dolan*, permit conditions required the applicant to grant an easement over their property in favor of the public. In *Koontz v. St. Johns River Water Management District*, ___U.S.___, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013), the Court applied the *Nollan/Dolan* test to strike down a monetary exaction, where the permittee was asked to fund additional offsite mitigation in addition to granting an easement to the local regulating agency. In applying *Nollan/Dolan* to a monetary exaction, the Court analogized the requirement to fund offsite mitigation to situations in which the government has been held liable in takings for seizing specific funds such as a bank account. *Id.* at 2600.

Nollan, *Dolan*, and *Koontz* are permit cases in which the permitting agency failed to show nexus and proportionality for the real property and monetary exactions associated with specific development proposals. These “as applied” challenges are distinguishable from this case, where Petitioners seek to invalidate a legislative enactment. See *Olympic Stewardship Foundation (OSF) v. W. Wash. Growth Mgm’t Hearings Bd.*, 166 Wn. App. 172, 196, n. 21, 274 P.3d 1040 (2012) (questioning ripeness of claim in the absence of a specific development proposal). Rather, the time to evaluate a government requirement of an easement or monetary exaction will be in the context of a permit application, where nexus can be evaluated on a record.

Further, OSF's reliance on *Nollan/Dolan* is without merit because they mischaracterize the buffers as an exaction, which misreads the SMP. OSF argues that "the SMP requires that, as a mandatory condition on all new permit approvals, shoreline owners must designate a buffer on a legally binding document and/or execute a conservation easement." OSF Brief at 45. In fact, the SMP merely requires that critical area boundaries be identified on plats and binding site plans. JCC 18.22.270(9).²² "The applicant may also choose to dedicate the buffer through a conservation easement or deed restriction." JCC 18.22.270(10).²³ However, this is not a requirement. Thus, contrary to OSF's assertion, and unlike the facts in *Nollan, Dolan*, and *Koontz*, the SMP buffers do not deprive any property owner of any fundamental attribute of property ownership, i.e., the SMP does not impact an owners "right to possess, to exclude others, or to dispose of property."²⁴ *Guimont v. Clarke*, 121 Wn.2d 586, 595, 854 P.2d

²² In this context, it is the incorporated provisions of the CAO under discussion, i.e., JCC 18.22.270. JCC 18.22.270(9) states in its entirety, "[i]n the case of short plat, long plat, binding site plan, and site plan approvals under this code, the applicant shall include on the face of any such instrument the boundary of the [Fish and Wildlife Habitat Conservation Area]."

²³ JCC 18.22.270(10) provides in its entirety, "[t]he applicant may also choose to dedicate the buffer through a conservation easement or deed restriction that shall be recorded with the Jefferson County auditor. Such easements or restrictions shall, however, use the forms approved by the prosecuting attorney."

²⁴ OSF's reliance on RCW 64.04.130 is misplaced, as that statute simply authorizes an agency to acquire and hold an interest in real property. OSF's citation to a decision of the state Tax Appeals Board is similarly flawed. See *Klickitat County v. Dep't of Revenue*, No. 01-070-01-099, 2002 WL 1929480 (Feb. 7, 2002). In that case, the Board considered whether a nonprofit organization was exempt from property taxes for a failed subdivision that it purchased with the intent to preserve it as open space. 2002 WL 1929480. Last, in *Richardson v. Cox*, 108 Wn. App. 881, 26 P.3d 970 (2001), the real property at issue was a 30-foot right of way easement conveyed by one private party to another. OSF fails to cite to any authority in which a shoreline buffer was deemed an exaction.

1 (1993) (internal citations omitted). As indicated by *Dolan*, the nature of a permit restriction makes a difference: “The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control. The difference to petitioner, of course, is the loss of her ability to exclude others.” *Dolan* at 393.

While there are Washington cases that have examined land use ordinances under *Nollan/Dolan*, the context for those cases has arisen under RCW 82.02.020. RCW 82.02.020 prohibits local government from imposing most direct and indirect taxes or fees against development of land, but authorizes dedications of land or easements that “are reasonably necessary as a direct result of the proposed development.” This language has been interpreted to require compliance with *Nollan/Dolan*. *OSF v. WWGMHB*, at 197-98. However, RCW 82.02.020 does not apply to SMPs because they are “not the product of local government.” *Citizens*, 172 Wn.2d at 393; *Orion*, 109 Wn.2d at 643-44. Thus, OSF fails to adequately establish the basis for applying *Nollan/Dolan* to the SMP.

b. The SMP’s buffer provisions include mechanisms to address site specific considerations

OSF argues as if the SMP’s provisions are “one-size-fits-all” exactions without any consideration of the impacts of proposed development. OSF mischaracterizes the SMP’s buffer provisions, which provide site-specific flexibility through a variety of mechanisms. To the extent *Nollan/Dolan* applies here, the requirements of nexus and

proportionality can be met because buffers can be tailored to site-specific circumstances.

Contrary to OSF's attack, the standard buffers contained in the SMP are just a starting point. Based on site-specific circumstances, the SMP provides six ways to reduce a shoreline buffer, and four of these can be achieved administratively without a shoreline variance permit. CP 6026-31 (SMP, Art 6.E). The applicability of these options will depend on the proposal and the property (which also confirms that OSF can, at this time, make only a facial challenge). For example, when the depth of a shoreline lot is equal to or less than the standard buffer with (i.e. a nonconforming lot), a new or expanded residence can be sited in a 2,500 square foot building envelope in the buffer without the need for a variance, so long as it is built no closer than 30 feet from the water. CP 6026-27 (SMP, Art. 6.E.1) In order to accommodate shoreline views on nonconforming lots, a new residence can be built where the historic development pattern has established a "common line" buffer. CP 6027-29 (SMP, Art. 6.E.2). Buffers can be reduced up to 25 percent without a variance where the adjacent slopes do not exceed 30 percent.²⁵ CP 6026 (SMP, Art. 6.D.10); JCC 18.22.270(6), (7). Alternatively, the SMP allows a reduction of 25 percent through buffer averaging when necessary due to site constraints caused by existing physical characteristics such as slopes, soils or vegetation. *Id.* If the site-specific circumstances preclude these

²⁵ The buffer reduction and buffer averaging provisions include a list of additional conditions that must be met, including the requirement that the reduction does not reduce the functions and values of the habitat. JCC 18.22.270(6), (7).

options, a landowner has the option of seeking a variance to reduce the buffer through the development of a Critical Area Stewardship Plan, or can proceed with a standard variance. CP 6026, 6030 (SMP, Art. 6.D.12, E.3). In addition, the SMP allows for limited expansion of existing nonconforming uses or structures without a variance or conditional use permit. CP 6143-44 (SMP, Art. 10.6.H).

In short, there is no merit to OSF's premise that the buffers are "one-size-fits-all" without any regard for the actual content of the SMP. The SMP buffers take into account the site-specific attributes of a property, the proposed development, and the need for protection at the site. These features and mechanisms ensure that the SMP is not, on its face, a taking of property.

c. The buffer provisions are supported by science

"Where 'best available science' provides a scientific basis for restricting development and disturbance within a critical area, the science ensures that the nexus and proportionality tests are met." *OSF v. WWGMHB*, 166 Wn. App. at 199 (citing *Honesty in Envtl. Analysis & Legislation (HEAL) v. CPSGMHB*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999)); *see also KAPO v. CPSGMHB*, 160 Wn. App. at 273, *review denied*, 171 Wn.2d 1030 (2011), *cert. denied* 132 S. Ct. 1792, 182 L. Ed.2d 616 (2012). While these cases involved CAOs that were based on "best available science" (BAS) under the GMA, the rationale is equally applicable to SMPs because the SMA includes a similar science

requirement. *See* WAC 173-26-201(2)(a) (local jurisdictions shall “identify and assemble the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern.”) Further, the SMP buffer provisions are predicated in large part on an incorporated CAO that was based on BAS. *See OSF v. WWGMHB*, 166 Wn. App. at 199.

The buffers are based on a comprehensive scientific and technical analysis specific to Jefferson County that is described at length by the County, and in sections V.A.1, 6, and 8, pp. 7-10, 14-16, 17-20. The analysis demonstrates that such buffers are necessary to address the impacts of development on the County’s shorelines. At the same time, the SMP advances private property interests by including mechanisms that allow for site-specific considerations and that reflect the environmental impacts of a particular proposal. Where the SMP uses a flexible buffer to address development in areas that have been identified for protection, and where the record demonstrates that such buffers are necessary to address the impacts of development, the constitutional requirements of nexus and proportionality are met. OSF fails to meet its heavy burden in proving the buffers are unlawful.²⁶

²⁶ Notwithstanding OSF’s attempt to shift the burden, the SMP is presumed constitutional, and the burden remains on OSF to prove otherwise. *Peste*, 133 Wn. App. at 472.

d. The public access provisions are lawful

One of the three primary goals of the SMA is to promote public access²⁷ and enjoyment of the shoreline. RCW 90.58.020. This policy goal is a reflection of the public trust doctrine in which the waters of the state are a public resource available to all citizens for purposes of navigation, commerce, fishing, recreation, and similar uses. *Orion*, 109 Wn.2d 621 at 639-41. Accordingly, the SMA expressly requires SMPs to include a public access and recreational element. RCW 90.58.100(2)(b), (c). The Guidelines, in turn, contain principles and standards that must be included in all SMPs. *See* WAC 173-26-221(4). These provisions seek to balance the public interest in the shorelines with private property rights and public safety. For example, a SMP must:

(iii) Provide standards for the dedication and improvement of public access in developments for water-enjoyment, water-related, and nonwater-dependent uses and for the subdivision of land into more than four parcels. *In these cases, public access should be required except:*

(A) Where the local government provides more effective public access through a public access planning process described in WAC 173-26-221(4)(c).

(B) *Where it is demonstrated to be infeasible due to reasons of incompatible uses, safety, security, or impact to the shoreline environment or due to constitutional or other legal limitations that may be applicable.*

In determining the infeasibility, undesirability, or incompatibility of public access in a given situation, local governments shall consider alternate methods of providing public access, such as offsite improvements, viewing

²⁷ “Public access includes the ability of the general public to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and to view the water and the shoreline from adjacent locations.” WAC 173-26-221(4)(a).

platforms, separation of uses through site planning and design, and restricting hours of public access.

(C) For individual single-family residences not part of a development planned for more than four parcels.

WAC 173-26-221(4)(d) (emphasis added).

OSF challenges the SMP provisions that implement this SMA requirement. *See, e.g.*, CP 6036 (SMP, Art. 6.3.B.3). OSF's challenge fails because it ignores how the SMP limits the County's ability to require public access, which should only be required "when the development would either generate a demand for one or more forms of access, and/or would impair existing legal access opportunities or rights," and only when consistent with "all relevant constitutional and other legal limitations on regulation of private property."²⁸ CP 6035 (SMP, Art. 6.3.A.8).

Similarly, OSF's arguments that the SMP's public access provisions violate nexus and proportionality are not well taken in light of the protections expressly built into the SMP for that purpose. Speculation as to how the regulation might be applied in the future is insufficient to support a conclusion that the SMP is unlawful. *Thun*, 164 Wn. App. at 765. If, in a given circumstance, the County implements the public access provisions in an unlawful manner, it can be addressed in the context of the specific permitting decision at issue.

²⁸ *See also* CP 5955 (SMP, Art. 1.3.D) ("When regulating the use and development of private property, the County's actions must be consistent with all relevant legal limitations including constitutional limitations. This Program must not unconstitutionally infringe on private property rights or result in an unconstitutional taking of private property.")

B. Citizens Alliance for Property Rights

- 1. The SMP meets the requirements in RCW 90.58.100 and WAC 173-26-201**
 - a. The Guidelines do not require an economic impact statement**

CAPR argues that the SMP violates RCW 90.58.100 by failing to reflect the natural and social sciences. Specifically, CAPR argues that the County and/or Ecology was required to prepare an economic impact statement, and that the residential development standards are not supported by science. As explained below, CAPR’s arguments fail.²⁹

In preparing SMPs, local government “shall to the extent feasible . . . utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts.” RCW 90.58.100(1)(a). Local governments shall also “to the extent feasible . . . utilize all available information regarding . . . economics.” RCW 90.58.100(1)(e). Along with the other provisions in RCW 90.58.100, these references to economics and the social sciences set the context in which local jurisdictions need to plan for water dependent uses:

(2) The master programs shall include, when appropriate, the following:

(a) An economic development element for the location and design of industries, projects of statewide significance, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly

²⁹ Under RAP 10.3(a)(6), the Court should also reject any of CAPR’s issues that are not supported by argument, including CAPR’s list of citations on page 25 of its brief.

dependent on their location on or use of the shorelines of the state.

RCW 90.58.100(2)(a). These concepts are fleshed out more fully in the Guidelines at WAC 173-26-201(2) and (3). Collectively, these regulations create the framework for the interdisciplinary approach referred to in RCW 90.58.100, and are the vehicle through which the “coordination in the management and development of the shorelines of the state” is accomplished. RCW 90.58.100. Under the SMA, a local jurisdiction is required to plan for shoreline development while at the same time ensuring no net loss. This is achieved through the use analysis, the Inventory, and the Cumulative Impacts Analysis, which account for the “social sciences” and “economic development” in the local development of the SMP. No tribunal has ever interpreted the SMA to require an economic impact analysis before a SMP could be approved, and the Court should not do so here.

As noted by the Board, concerns regarding the SMP’s economic impacts were raised “repeatedly” during the development of the SMP. CP 7512 (FDO at 60). The County’s response to these concerns are detailed in its Response Brief and summarized by the Board: “[e]conomic feasibility of regulatory compliance was factored into many of the County’s goals and regulations” *Id.* CAPR fails to acknowledge the flexibility that is built into the residential development provisions, which address many of CAPR’s concerns regarding buffers, permitting and

redevelopment of nonconforming uses. *See, e.g.* CP 6024-31, 6142-45 (SMP Art. 6.1.D, Art 10.6).

CAPR's arguments regarding RCW 43.21H are beyond the scope of this appeal. *See* RCW 90.58.190. Nor is there any basis for CAPR's argument that RCW 43.21H.020 requires an economic impact statement, which applies to agency rulemaking. *See generally*, RCW 43.21H.030. CAPR's arguments that the SMP fails to account for the local socio-economic circumstances must be rejected.

b. The SMP is supported by science

CAPR argues that the SMP is not supported by adequate science, and that Cumulative Impacts Analysis and Inventory are lacking. CAPR's arguments must be rejected for the reasons described in Section V.A.8 at pp. 17-20, above. CAPR is also incorrect in stating that the County was required to do original research in order to update the SMP. The Guidelines state that existing information should be used and that new research is not required. *See* WAC 173-26-201(2)(a).

Next, CAPR argues that bigger buffers are not necessary because the County's shoreline is in good shape. CAPR ignores the extensive evidence before the Board showing that the Puget Sound shorelines are at risk due to increased development, septic failures, inappropriate uses, and alterations of natural shoreline processes. WAC 173-26-221(5)(b); CP 4338-80, 6477-96, 7126-29. As Ecology's SMP Handbook explains, many of the SMPs adopted in the 1970's have 25-foot to 35-foot

setbacks.³⁰ These setbacks were established largely to protect structures from erosion and effects from wind and water, and also to prevent new houses from blocking views. CP 4344. When the original SMPs were drafted, the benefits of buffers were not well understood, and little consideration was given to the protection of ecological functions as required by the SMA. *Id.* “Recent scientific studies show that 25-foot setbacks do not protect most ecological functions and will not meet the no net loss standard of the SMP Guidelines.” CP 4344. The size of the buffers are also in accord with buffers imposed in other rural residential, low density areas in Western Washington, such as Whatcom County. CP 4366. Simply put, the record disproves CAPR’s claim that the Inventory and Cumulative Impacts Analysis do not meet the requirements of RCW 90.58.100 and WAC 173-26-201(2), and that the SMP buffers are not supported by the science.

2. The SMP is not unlawfully vague

CAPR argues the SMP is unconstitutionally vague. While CAPR recites a list of SMP provisions, CAPR fails to provide any discussion or analysis of these provisions, which permits this Court to disregard the argument. *Fishburn*, 161 Wn. App. at 471. For the reasons below and discussed by the County, CAPR’s vagueness claim is without merit.

³⁰ A setback is the minimum distance separating two features, such as a house and a bluff. A setback may or may not be vegetated. In contrast, a buffer is a relatively undisturbed and vegetated area that represents the transition between the aquatic and upland areas. CP 4339-40.

CAPR identifies the SMP's public access provisions and climate change policy as examples of vagueness, yet the SMP's public access provisions are anything but vague. The Guidelines require public access for residential subdivisions in excess of four units and other development except where infeasible or constrained by constitutional or other legal limitations. WAC 173-26-221(4). Accordingly, the SMP requires the County to consider "opportunities to provide visual and/or physical public access" during the review of "all proposed commercial and industrial shoreline developments and residential developments involving more than four (4) residential lots or dwelling units." CP 6036 (SMP, Art. 6.3.B.2). The SMP also unequivocally states, "[s]ingle-family residential developments with four (4) or fewer lots/units should not be required to provide public access." CP 6035 (SMP, Art. 6.3.A.6). As discussed by the County, this clarity is reflected in other SMP provisions as well. The Board correctly observed that "CAPR neglects to indicate any specific language that could be interpreted as lacking clarity." CP 7527 (FDO at 75). CAPR's arguments that the SMP is unlawfully vague must be rejected.

3. The Board correctly concluded that the SMPs use provisions are lawful

CAPR challenges the Board's ruling affirming various SMP "use provisions" relating to beach stairs, boating facilities, shoreline armoring (bulkheads), and floodplain development. CAPR makes vague arguments regarding the science supporting these provisions, and argues that the

provisions are so onerous that they result in a de facto prohibition and violation of CAPR's due process. For reasons described below, CAPR fails to prove the Board's dismissal of its arguments was in error.

a. The SMP's use provisions are well-founded and based on science

CAPR alleges there is no evidence to support the conclusion that development causes impacts to the shoreline environment so as to justify the SMP's use provisions. But the evidence shows that "[a]lterations of the physical and biochemical processes that create and maintain the nearshore environment will typically have deleterious effects on shoreline functions and values."³¹ CP 6307. The deleterious effects from shoreline armoring, piers, ramps, docks, vegetation removal, and other shoreline modifications are well documented in the Inventory.³² CP 6307-11. The Inventory analyzes the impacts of these uses within each of the County's watersheds. CP 6311-12. The Inventory also catalogs all of the known shoreline armoring, marinas, beach access stairs, docks, and other overwater structures for each reach of shoreline. CP 6311-12, 6336-6457. Contrary to CAPR's bald assertion, well-established science supports the SMP's use provisions.

³¹ Battelle Marine Sciences Laboratory is an acknowledged contributor to the Inventory. CP 6225. This does not square with Dr. Flora's characterization of Battelle's conclusions regarding the Bainbridge Island nearshore.

³² These impacts include disruption of natural sediment processes and shore-drift patterns, intensification of wave energy, erosion, water quality degradation, direct and indirect impacts to forage fish, alteration of habitat forming processes, and salmonid predation. CP 6309-10.

CAPR relies on comments submitted by Dr. Flora for the proposition that development in the shoreline does not cause impacts.³³ CP 2447. Dr. Flora's work has been criticized by scientists with expertise in issues affecting Puget Sound. CP 5617-18. Dr. Flora's comments were considered by the County and Ecology. CP 2381, 5631-33. The SMP is lawful where the County produced "valid scientific information and consider[ed] competing scientific information and other factors through analysis constituting a reasoned process." *OSF v. WWGMHB*, 166 Wn. App. 172, at 191 (citing *Ferry Cty. v. Concerned Friends of Ferry Cty.*, 155 Wn.2d 824, 834, 123 P.3d 102 (2005)).³⁴ It is not enough for CAPR to assert that one expert disagreed with another.

b. The SMP's use provisions are dictated by the Guidelines

CAPR alleges that the SMP's use provisions are onerous, but neglects to mention that the uses it complains of are allowed almost everywhere in the shoreline. For example, boat launches are allowed in all environments except Priority Aquatic, with a Conditional Use Permit (CUP) required for the Natural and Conservancy environments. CP 6016-18 (SMP, Art. 4, Table 1). Piers, docks, and floats are allowed everywhere except Priority Aquatic and Natural environments, with a

³³ Dr. Flora comments on research done by a "well-known Northwest contract-research firm" that focused on the Bainbridge Island and eastern Kitsap County. CP 2447. The research Dr. Flora is commenting on does not appear to be in the record. Its relevance to Jefferson County has not been established.

³⁴ While these cases are discussing the "best available science" requirement that applies to critical areas under the GMA, the science requirement for SMPs is similar. See WAC 173-26-201(2)(a).

CUP required for the Conservancy environment. *Id.* Beach access structures are allowed in the Conservancy, Residential, and High Intensity environments with a CUP. *Id.* Shoreline armoring is allowed in the Conservancy, Residential, and High Intensity Environments. Armoring and beach access structures are prohibited only in the Natural environment, which is consistent with the County's determination that such areas are "[u]nable to support new development or uses without significant adverse impacts to ecological functions or risk to human safety."³⁵ CP 6460. CAPR also alleges that the SMP imposes a public access requirement on an owner of a single family residence when authorizing beach access stairs, but this is not true. CP 6035 (SMP, Art. 6.3.A.6). CAPR's assertion that the SMP results in a de facto prohibition of these uses is incorrect.

Regarding development in flood-prone areas, CAPR objects to the SMP policy that states, "[t]he county should prevent the need for flood control works by limiting new development in flood-prone areas." CP 6065 (SMP, Art. 7.5.A.1). Yet, this provision is mandated by the Guidelines, which prohibit new development in floodplains "when it would be reasonably foreseeable that the development or use would require structural flood hazard reduction measures within the channel migration zone or floodway." WAC 173-26-221(3)(c).

³⁵ For example, "the erosion of glacial and non-glacial sedimentary deposits has created high-elevation, often unstable bluffs along the shoreline of much of eastern Jefferson County." CP 6298. It does not make sense to allow beach access structures in these areas, from both an ecological and human safety standpoint.

While single family residences are identified as a preferred use under the SMA, this does not mean that the SMP cannot restrict or limit residential appurtenances and accessories, as CAPR would have it. *See e.g. Buechel*, 125 Wn.2d at 209; *Lund*, 93 Wn. App. 329 at 337; *Samson*, 149 Wn. App. at 51. Where the County “opted to strike the required balance by allowing various uses in specific Shoreline Environment Designations (SEDs) and by authorizing other uses pursuant to the conditional use permit process,” the SMP is lawful. CP 7512 (FDO at 6). CAPR fails to prove that the SMP’s use provisions are inconsistent with the designation criteria and use standards in the Guidelines. *See* WAC 173-26-241(5), -231(3), -241(3).

c. The SMP’s Use Provisions do not violate CAPR’s due process

CAPR argues that the SMP violates substantive due process. In evaluating this claim the Court must determine whether: (1) the regulation at issue is aimed at achieving a legitimate public purpose; (2) the method used is reasonably necessary to achieve that purpose; and (3) the regulation is unduly oppressive.³⁶ *Presbytery of Seattle v. King Cty.*, 114 Wn.2d 320, 329-30 787 P.2d 907 (1990); *Guimont*, 121 Wn.2d at 608-09. Because CAPR fails to prove these elements, CAPR’s claim must be rejected.

³⁶ The “unduly oppressive” inquiry includes consideration of such factors as the nature of the harm to be avoided; the availability and effectiveness of less drastic measures; and the economic loss suffered by the property owner. *Presbytery* at 329-30.

Substantial evidence exists in the record to support a finding that the SMP's use and buffer provisions address a legitimate public interest (public safety and natural resource protection), and are reasonably necessary to protect that interest. *See* RCW 90.58.020; *see also* Sections IV(B)(1)(b),(3)(a), and (3)(b), at pp. 32-33, 35-36, and 36-38, above.

CAPR argues that the SMP is unduly oppressive because it reduces property values. However, as noted in the Cumulative Impacts Analysis, there is "no evidence of decreased waterfront property values over the past forty years under Shoreline Management Act regulation." CP 6573. CAPR relies on the declaration of Eugene Farr (Farr Declaration) to support its allegation. This is problematic for a number of reasons. Farr's main employment was as a member of the military. Having only "occasionally worked part time in real estate sales," Farr lacks sufficient expertise under ER 702 to offer an opinion on the SMP's impacts on property values. Farr Decl. ¶ 7. *Katare v. Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012) (an expert may not testify outside his area of expertise). There is no evidence that the methodology employed by Farr is reliable or accepted by experts in the field.³⁷ *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 603, 260 P.3d 857 (2011).

³⁷ For example, Farr's conclusions are based on "assessed" value. Assessed value is typically based on a percentage of the appraised value which is used to determine the property tax rate. Assessed value can often be far less than market value, and because it is based on historic sales (anywhere from 1-3 years), assessed value does not represent a property's value in real time. For this reason, when listing a home a seller does not rely on the assessor's value but bases the list price on a market analysis. As a member of OSF, Farr's declaration is self-serving and lacks reliability on that basis as well.

Farr speculates that an alleged decline in property values can be attributed to the SMP, but fails to establish a causal relationship. *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786 (2007) (speculative testimony is no less speculative simply because it comes from an expert). Farr relies on statements from the County Assessor but Farr fails to acknowledge that the Assessor also admitted that he “was unaware of any examples where new critical area buffers had reduced property values” Farr Decl., Ex. A at 3. Perhaps most telling is the fact that Farr alleges shoreline property values went down in 2011, *three years before* the effective date of the SMP.³⁸ CAPR lacks credible evidence indicating shoreline property values have declined as a result of the SMP.³⁹

CAPR also cannot prove that the SMP’s permitting requirements are unduly oppressive. The SMA mandates certain use of conditional use permits (CUP). *See* RCW 90.58.100(5), WAC 173-26-201(3)(d)(iii). The Board appropriately recognized that “requiring consideration of impacts through a conditional permit process is a valuable tool for accommodating shoreline uses while providing for control of pollution and prevented damage to the Natural environment.” CP 7533 (FDO at 81). While a CUP might impose some additional administrative process or cost, none of

³⁸ Ecology approved the SMP on February 7, 2014, and it became effective 14 days later, CP 6920-21.

³⁹ In the record supporting the Bainbridge Island SMP, there is evidence that shows buffers and other SMP do not devalue property. These findings are available on Ecology’s website.

See <http://www.ecy.wa.gov/programs/sea/shorelines/smp/mycomments/BainbridgeIsland/attachD.pdf> at 1-2; *see also* ER 201; *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015) (court may take judicial notice of public documents if authenticity of those documents cannot be reasonably disputed).

the cases cited by CAPR stand for the proposition that the requirement to obtain a permit for a land use violates due process. The Court should reject CAPR's substantive due process claims.

4. CAPR's due process rights were not abridged by the adjudication before the Board

CAPR argues that the adjudication process established by the Legislature for hearing appeals of SMPs such as this one is a violation of due process. More specifically, CAPR argues that the standard of review under RCW 90.58.190 is unlawful, and that it was denied a neutral hearing because the Board is comprised of appointed members under RCW 36.70A.250. CAPR's arguments lack merit.

Regarding the standard of review, CAPR relies primarily on a case involving the Multiemployer Pension Plan Amendments Act of 1980. *Concrete Pipe & Products of Cal, Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993). In *Concrete Pipe*, the court was interpreting a particularly complex and "incoherent" statute regarding employer pension plans. *Id.* at 627. *Concrete Pipe* has no relevance to this case.⁴⁰

CAPR's arguments about the fairness of the tribunal must also be rejected. As the County points out, there is no basis for CAPR's assertion that the Board must be comprised of elected officials. CAPR's arguments

⁴⁰ The court rejected the employer's arguments that the statutory presumptions in favor of the trustees of the pension plans violated due process. *Id.* at 634-36. If anything, the holding of *Concrete Pipe* is contrary to CAPR's arguments regarding RCW 90.58.190, because the court in *Concrete Pipe* upheld the burden shifting that CAPR complains of here.

ignore a fundamental component of administrative law, in which the agency provides a hearing in the first instance. *See, e.g.* RCW 34.05.425. To the extent a petitioner is dissatisfied with the agency decision, the remedy is judicial review by the court in an action such as this one.⁴¹ RCW 34.05.570. CAPR's due process arguments must be rejected.

C. Hood Canal Sand & Gravel

1. Hood Canal Sand's pier project is not water dependent, but even if it were, a local jurisdiction does not have to allow water dependent uses everywhere

Hood Canal Sand argues that the SMP cannot prohibit water dependent uses in the Conservancy environment. Ecology agrees with the County that the pier project is not water dependent.⁴² However, even if it were, the SMA does not require that all water dependent uses be allowed everywhere throughout shoreline jurisdiction. *See e.g. Buechel*, 125 Wn.2d at 209, (affirming denial of residential construction in a shoreline residential environment);⁴³ *Lund*, 93 Wn. App. 329, (affirming denial of residential construction in a shoreline residential environment); *Bellevue Farm Owners Assoc. v. Shorelines Hearing Board (SHB)*, 100 Wn. App.

⁴¹ To the extent CAPR had concerns about the fairness of the proceeding, it failed to avail itself of the remedies provided for in RCW 34.50.425(4). As the party alleging bias, the burden is on CAPR to make an "affirmative showing of prejudice which would alter the outcome of the pending litigation. *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 580, 754 P.2d 1243 (1988). Mere participation in adjudicative functions is not a basis for disqualification. *Withrow v. Larkin*, 421 U.S. 35, 55, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). CAPR's concern is essentially a political one, yet a presiding officer's political or social outlook is irrelevant. *See Layne v. Hyde*, 54 Wn. App. 125, 131, 773 P.2d 83 (1989).

⁴² The SMA Guidelines allow new piers only for water dependent uses or public access. WAC 173-26-231(3)(b).

⁴³ Single family residences are not water dependent, but similar to water dependent uses, they are a preferred use under the SMA. RCW 90.58.020.

341, 364, 997 P.2d 380 (2000) (affirming denial of a large dock in the conservancy environment where “a property owner’s desire for a [large] dock must be balanced against the natural limitations of the subject shoreline”); *Samson*, 149 Wn. App. 33, 54 (affirming SMP prohibition on single-use private docks).⁴⁴

To meet no net loss, a local jurisdiction is obligated to determine where various water dependent uses may be allowed or disallowed, as dictated by the shoreline environment designation. WAC 173-26-201(3)(f), .211(4), .201(2)(c); CP 7022. In order to meet the SMA’s policy goals, uses cannot be allowed indiscriminately throughout the shoreline. RCW 90.58.020. The prohibition of industrial piers in the Conservancy environment is appropriate where “[t]he type and intensity of uses allowed in areas designated Natural and Conservancy are tightly controlled since these areas are the most sensitive to future development and the most vital to protect.” CP 5683.

2. Hood Canal Sand and Gravel fails to prove inconsistency under the test provided in the Guidelines

Hood Canal Sand argues for the first time on appeal that the SMP’s industrial pier provisions are inconsistent with the GMA.⁴⁵ Yet, Hood

⁴⁴ It should be noted that the Court in *Samson* did not consider the private docks at issue to be a preferred use. *Samson*, 149 Wn. App. at 50-51. Nonetheless, the Court considered and ultimately rejected Samson’s argument that the City’s prohibition on private docks in Eagle Harbor was contrary to the SMA’s goals. *Id.* at 52-53.

⁴⁵ Ecology agrees with the County that the Court should not entertain Hood Canal’s arguments. Hood Canal Sand failed to adequately brief this issue before the Board, limiting its argument to a single sentence: “Nor is there any consideration of the conflict between the proposed ‘prohibition’ and the fact that this use is an allowed use on the adjacent uplands under the Jefferson County Comprehensive Plan and Unified Development Code.” CP 2241. The Board properly deemed this issue abandoned.

Canal Sand fails to address the test in the Guidelines for analyzing consistency. Where the SMP meets the test for consistency in the Guidelines, the SMP cannot be considered inconsistent with the GMA.⁴⁶ The test in the Guidelines looks at three factors, only one of which is relevant to the arguments of Hood Canal Sand:⁴⁷

Provisions not precluding one another. The comprehensive plan provisions and shoreline environment designation provisions should not preclude one another. To meet this criteria, the provisions of both the comprehensive plan and the master program must be able to be met. Further, when considered together and applied to any one piece of property, the master program use policies and regulations and the local zoning or other use regulations should not conflict in a manner that all viable uses of the property are precluded.

WAC 173-26-211(3)(a).

Hood Canal Sand's arguments implicate this factor because it argues that the prohibition on new marine transport facilities in the Conservancy environment is inconsistent with the Mineral Resource Land Overlay, Jefferson County Ordinance No. 08-0706-04 (Overlay).⁴⁸ To prove an inconsistency, Hood Canal Sand must show either that: (1)

CP 7541-43 (FDO at 89-91). In the event that the Court reviews Hood Canal Sand's arguments here, Ecology addresses them.

⁴⁶ Hood Canal Sand's project is located in Hood Canal, on a shorelines of statewide significance. *See* RCW 90.58.030(2)(f)(ii), (iii). For shorelines of statewide significance, the scope of review is limited to a review of consistency with "the policy of RCW 90.58.020 and the applicable guidelines." RCW 90.58.190(2)(c). Thus, Hood Canal is limited to arguing GMA consistency only insofar as it is addressed in the Guidelines. *See* WAC 173-26-211(3).

⁴⁷ Regarding the other factors, there are no allegations in this case that the prohibition on mining is based on a concern about impacts on non-water oriented uses such that the use incompatibility is an issue under WAC 173-26-211(3)(b). Nor is there an allegation sufficient infrastructure is lacking under section WAC 173-26-211(3)(c).

⁴⁸ A copy of the Overlay is attached to the Response Brief of Hood Canal Coalition as an appendix.

provisions of the Overlay and SMP cannot both be met; or (2) that when considered together and applied to a specific property, all viable uses of the property are precluded. WAC 173-26-211(3)(a). Hood Canal Sand cannot prove either factor.

The Overlay does not extend into shoreline jurisdiction. Overlay, ¶ 130. Thus, the SMP does not apply to the lands that are subject to the Overlay, and Hood Canal Sand cannot show that the Overlay and SMP cannot both be met. In defending the Overlay in litigation unrelated to this case, Hood Canal Sand's predecessor specifically represented that the Overlay was not dependent on the marine transport system and that it would "continue to expand its operations, with or without the [Overlay]" *Hood Canal v. Jefferson County*, WWGMHB, No. 03-2-0006 (Compliance Order at 9); *see also* Overlay ¶ 139 ("[b]ecause this non-project action is focusing primarily on development regulations that would apply to mining in an inland forested area . . . [the Overlay] will not have any relevance to a marine transport proposal"). Hood Canal Sand fails to meet its burden in showing the first criteria of WAC 173-26-211(3)(a) is met.

As to the second criteria, Hood Canal Sand cannot prove that the SMP and the Overlay conflict such that there are no viable uses of the property. The commercial viability of the mine is not contingent on the pier project, which will supplement the existing truck routes that currently

serve the mine.⁴⁹ In fact, Hood Canal Sand anticipates a 50 percent increase in product moved by truck over the next few decades. Overlay ¶ 102. It should also be noted if the project is vested as alleged, the new SMP provisions regarding industrial piers will not even apply to the project, negating any allegation that the new SMP precludes viable use of the property. CP 2228-29. Hood Canal Sand fails to meet its burden in proving inconsistency under WAC 173-26-211(3)(a).

3. Consistency with statutes other than the SMA are not properly before this court

As stated by the County, Hood Canal Sand failed to preserve any argument related to the Aquatic Lands Act or Surface Mining Act. Even if it had, the scope of review is limited under RCW 90.58.190 and RCW 36.70A.320, and does not extend to a review of the SMP's consistency with either the Aquatic Lands Act or Surface Mining Act. If Hood Canal Sand wishes to challenge the SMP on other grounds than set forth in RCW 90.58.190 and RCW 36.70A.320, it can bring a different action in a different forum. *See e.g.*, RCW 7.24.146.

4. The SMP industrial pier prohibitions are supported by science and comport with the SMA

Hood Canal Sand challenges the SMP's prohibition on industrial piers in the Conservancy environment based on two related arguments. First, Hood Canal Sand argues that there is an insufficient scientific basis

⁴⁹ The circumstances of Hood Canal Sand are in stark contrast to the facility owned by Glacier Northwest at issue in *Preserve Our Islands*. Without its pier, the market for the Glacier Northwest facility was limited to the island it was located on. *Preserve Our Islands* at 510.

for the industrial pier prohibition. Second, Hood Canal Sand argues that the industrial pier provisions are unlawful when compared to the process the County and Ecology used to address net pen aquaculture.⁵⁰ Hood Canal Sand's arguments are not persuasive for the following reasons.

a. The science supports the SMP's industrial pier provisions

The impacts to the environment, navigation, and aesthetics from piers and docks are well-understood. *Samson*, 149 Wn. App. at 58; CP 5700. These environmental impacts include loss of benthic habitat, animal and plant injury/mortality, increased turbidity, light reduction, ambient light pattern alteration, noise disturbance, altered wave energy patterns, increased exotic species, toxics, nutrients, bacterial introductions, and alteration of water quality. *Samson*, 149 Wn. App. at 58. Piers can also contribute to beach erosion and disrupt natural sediment transport processes, and can impair ecologically significant eelgrass and kelp beds. CP 5694-95, 6309; *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 532, 137 P.3d 31, (2006). Shading from piers can alter juvenile salmon behavior and result in increased predation. Noise and turbidity can disrupt salmon migration and feeding. CP 5695. In light of these impacts, it is appropriate for a jurisdiction to limit where piers may be allowed in the shoreline. *Samson*, 149 Wn. App. at 58; *see also* WAC 173-26-231(3)(b).

⁵⁰ Net pen aquaculture is the practice of raising fish in an underwater net that serves as a containment pen for the fish.

The SMP must be tailored to the values and characteristics of each particular stretch of shoreline. WAC 173-26-201(2)(c), .201(3)(c), (d). In this case, the shoreline area in question is highly functioning with a low degree of modifications or stressors. There is extensive presence of salmonid habitat, salt marshes and lagoons (which are high value areas that are particularly sensitive to disturbance), erosive and/or hazardous slopes, and commercial shellfish beds. CP 3693. All of these attributes warrant a higher level of protection. WAC 173-26-211(4)(b). Additionally, the shoreline area in question is a shoreline of statewide significance, which further justifies the SMP provisions at issue here. RCW 90.58.020; *Samson*, 149 Wn. App. at 47-48.

b. Net pen aquaculture and industrial piers are similarly restricted as allowed under the SMA

When the County submitted its draft SMP to Ecology, the SMP contained a County-wide prohibition on net pen aquaculture. CP 6856. In light of local circumstances, Ecology determined that the County's prohibition failed to adequately account for the status of aquaculture as "an activity of statewide interest" in which local jurisdictions shall "recognize the necessity for some latitude in the development of this use as well as its potential impact on existing uses and natural systems." WAC 173-26-201(2)(d)(ii); WAC 173-26-241(3)(b)(i) (A), (B). Thus, Ecology required the County "to develop an approach of limited allowance for net pens with effective protections for ecological resources." CP 6911. To address public concerns about the ecological impacts of net

pen aquaculture, the County and Ecology engaged in an extended period of deliberations, public outreach, educational workshops, and consultation with relevant state and federal agency experts. CP 6909-16. The end result is that the SMP authorizes net pen aquaculture as a conditional use only in aquatic areas adjacent to the “high intensity” environment.⁵¹ CP 6016 (SMP, Art. 4.3.A, Table 1), CP 6085 (SMP, Art. 8.2.C., Figure 1). Similar to net pens, the SMP allows industrial piers in aquatic areas adjacent to the High Intensity environment. CP 6017 (SMP Art. 4.3.A, Table 1), CP 6107-08 (SMP, Art. 8.6). Both activities are prohibited in the Conservancy environment. CP 6016-17 (SMP, Art. 4.3.A, Table 1). Thus, the SMP restricts these two activities similarly. As explained in Section IV(C)(1) at pp. 42-43, above, it is permissible to restrict uses in different shoreline environments. Hood Canal Sand fails to prove that such restrictions are unlawful here.

VI. ATTORNEY FEES

Both OSF and CAPR ask for attorney fees under RCW 4.84.350. A court can only award fees to a prevailing party, and only when the agency action was not “substantially justified.” RCW 4.84.350(1). Whether Petitioners are a prevailing party or not, the Board’s Order was “substantially justified” and Petitioners are not entitled to attorney fees.


⁵¹ Net pen aquaculture is also allowed in aquatic areas adjacent to the Natural environment where the County’s jurisdiction extends seaward beyond eight miles. *Id.*

VI. CONCLUSION

Petitioners fail to meet their heavy burden in proving that the Board's Order violates the SMA and Guidelines, and that the SMP is unconstitutional. This Court should affirm the Board's Order and dismiss Petitioners' appeals.

RESPECTFULLY SUBMITTED this 27th day of April, 2016.

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WASHINGTON STATE ATTORNEY GENERAL

April 27, 2016 - 4:30 PM

Transmittal Letter

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Case Name: Olympic Stewardship Foundation v. State of Washington

Court of Appeals Case Number: 47641-0

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Department of Ecology's Response Brief

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NO. 47641-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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AND VAL SCHINDLER, RONALD
HOLSMAN, CITIZENS' ALLIANCE
FOR PROPERTY RIGHTS
JEFFERSON COUNTY, CITIZENS'
ALLIANCE FOR PROPERTY
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MATS BAY TRUST, JESSE A.
STEWART REVOCABLE TRUST,
CRAIG DURGAN, and HOOD
CANAL SAND & GRAVEL LLC
d/b/a THORNDYKE RESOURCE,

v.

STATE OF WASHINGTON
ENVIRONMENTAL AND LAND
USE HEARINGS OFFICE, acting
through the WESTERN
WASHINGTON GROWTH
MANAGEMENT HEARINGS
BOARD; STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY; and JEFFERSON
COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on April 27, 2016, I caused to be served the Department of Ecology's Response Brief and Answer to Pacific Legal Foundation's Amicus Brief in the above-captioned matter upon the parties herein as indicated below CM/ECF system which will send notification of such filing to all parties of record as follows:

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I further certify that on the April 28, 2016, I caused to be served the Department of Ecology's Response Brief and Answer to Pacific Legal Foundation's Amicus Brief on the following parties via e-mail:

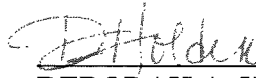
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